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urban R. R. Co., 36 Wash., 387, the plaintiff was wrongfully ejected from one of the defendant's cars, and as a result, injured by falling upon a third rail. The case may be distinguished from those preceding it, in that the plaintiff here was an adult, and not a trespasser.

Granting that the owner of property, upon which is so dangerous an instrumentality as a highly electrified third rail, may be held to an extraordinarily high degree of care in protecting the public, it would seem that the rule of reasonable care must govern, and that when, in the opinion of the court, such care has been exercised, actual negligence must be proven to render him liable for injuries sustained by reason of such third rail. "Reasonable care does not require such precautions as will absolutely prevent injuries or render injuries impossible." *Sjogrens Hall*, 53 Mich., 274.

It is also a fundamental legal proposition, that trespassers do not have such rights upon property of others as may be necessarily due those of the public who are on such property by right, of the owner's permission. "One is under no duty, as to a mere trespasser, to keep his premises in safe condition, even though the trespasser be an infant." *Frost v. Eastern R. R. Co.*, 64 N. H., 220; *Hortenstine v. Va. & Carolina R. R. Co.*, 102 Va., 914.

"Third rail" cases may be clearly distinguished from the "spring gun" cases, in that the third rails are placed upon property for a specific economic purpose, not even incidentally induced by malicious motives looking toward an intentional injury to trespassers.

A review of cases in point, and of those analogous, indicates that, where the degree of care exercised by the owner of property is commensurate with the dangerous character of instrumentalities thereon, trespassers, even though infants, will not be allowed damages for injuries caused by such instrumentalities.

APPROPRIATION OF A RAILROAD'S RIGHT OF WAY FOR ANOTHER USE.

In the case of the *Portland Railway, Light & Power Co. v. City of Portland*, 181 Fed., 832, it was held that where a city has only general charter powers to open, lay out, and establish streets, and to condemn property therefor, it has no authority to condemn

a part of a railroad's right of way in order to construct a street parallel with the same.

As a general rule, of course, property cannot be appropriated for two uses. A city has by its inherent power right to condemn certain lands for public use and such power may be conferred by operation of general laws and judicial tribunals. As to what is the proper and legal meaning of a public use two theories have been advanced. The one, that for a public use to exist there must be a literal use or right to use on the part of the public, generally without the payment of compensation therefor. While the other theory holds that a public use means a public benefit, utility or advantage and one not limited by actual use by the public in the property. The generally accepted view is that the latter theory is correct.

In *Bachus v. Lehanan*, 11 N. H., 19, it was held that the right of a city to condemn for public use must be conferred by general laws or by judicial tribunals. But when it comes to a city condemning one use for another, such authority must be specifically conferred. This principle is laid down emphatically in *Milwaukee & St. Paul Ry. Co. v. Faribault*, 23 Minn., 167, and is reiterated in *Appeal of Tyrane Township School District*, 15 Atl. (Pa.), 667, where it was held that a municipality has no authority to lay a street over grounds acquired by a railroad company. In the case of *New Jersey Southern Railroad Co. v. Commonwealth*, 39 N. J. L., 28, this principle was also recognized. *Lewis on Eminent Domain*, Sec. 266, holds with numerous authorities that a part of a railway right of way may not be taken longitudinally nor can any interference be made with the railway right-of-way. *Chicago, Rock Island & Pac. Ry. v. Town of Lake*, 71 Ill., 333.

There is, however, an exception to the general rule, where the second use does nothing to diminish or damage the prior use, and in many cases the courts have ruled according to this exception. Strictly speaking, the power of eminent domain is continuing and inextinguishable, and if the public good requires it, all property is subject to its exercise, and a second appropriation may be made where it is not inconsistent with the first and does not tend to deprive the first person acquiring it of his rights. The *South Carolina Railroad Co. v. Steiner*, 44 Ga., 546. In condemning property for a second use the circumstances and sur-

rounding conditions, as well as the needs of the community must be reckoned with. The relative importance and necessities of the two uses must be weighed, together with the extent of harm done. Certainly no municipality acting under general powers could lay out a highway through a public reservoir so as to ruin it; *In re Boston & Albany Ry.*, 53 N. Y., 574; yet, on the other hand, if a tract of land held for public purposes was so broad that it was impracticable to go around it, even though it could not be crossed without some serious harm, it might be held lawful for the way to cross it. *Wood v. Macon & Brunswick*, 68 Ga., 539. *In re Boston and Albany R. R.*, *supra*.

The Federal Court in the *Oregon Short Line Ry. Co. v. Postal Telegraph Cable Co.*, 111 Fed., 845, lays down a rule which is extremely broad in giving a city the power of condemnation. There it was held that property already dedicated to a public use stands upon the same footing as other property and is subject to condemnation as is other property, provided the second use shall not interfere with the first use. This principle is also laid down in the case of the *Northwestern Telephone Exchange Co. v. Chicago, Minnesota, St. Paul Ry. Co.*, 76 Minn., 334.

Thus it seems to be a well settled principle that a general charter does not confer power on a municipality to convert part of one use to another use, and further that the legislative intent must appear by express words or necessary implication. Such implication never arises except as a necessary condition to beneficial enjoyment and efficient exercise of power granted and then only to the extent of necessity. *Hicok v. Hine*, 23 Ohio, 523.

A city's right to exercise a power of eminent domain rests upon the operation of constitutional provisions, the restriction of agencies selected for the exercise of the power and the question of public use. These all operate as a limitation upon the exercise of the power. The right of a city to condemn for a second use is limited to the taking of a portion of a crossing only and does not extend to the appropriation of an entire tract. Through necessity, in extreme cases, there may be an appropriation of one use for another, as in the case of a public street crossing a railroad track. This is implied by general authority conferred upon cities

without express provision upon the subject. *Little Miami Ry. Co. v. City of Dayton*, 23 Ohio St., 510.

It seems that from the preponderance of cases noted the general inclination is not to allow one use to be condemned in part for another use. At the same time, should the second use not endanger or destroy the first one, and public convenience demand it, then there may be an appropriation for a second use.

PRIORITY OF RIGHT BETWEEN UNRECORDED TRANSFEREE OF CORPORATE STOCK, AND ATTACHING CREDITOR.

In this age of rapid development of business through the means of corporate organization, and the ever-increasing issue and sale of corporate stock, the very interesting question presents itself as to the priority of right between an unrecorded transferee of corporate stocks and an attaching creditor of the transferor. This question arose in the case of *State Banking Co. v. Taylor*, 127 N. W., 590. The statutes of South Dakota (Sections 423 and 445) provide that "transfers of stock shall not be valid except as between the parties thereto, until the same are entered on the books of the corporation; and such books shall be kept open for the benefit of any stockholder, member or creditor." Under these circumstances the court held that "notwithstanding such statutory requirements, the rights of a transferee of corporate stocks, though the transfer is not entered on the stock books, is superior to that of a subsequent attaching creditor of the transferor, whether the creditor had notice of the transfer or not."

The courts in the different states are in irreconcilable conflict on the question whether or not the unregistered transferee is protected in his purchase. The courts of eleven states of the union, including the courts of Iowa, Illinois, California, Maine, Massachusetts, and the United States Circuit Court in *Johnson v. Laflin*, 103 U. S., 800, have held that an unregistered assignment of corporate shares is not good as against an attaching creditor of the assignor. This view is based, in some cases, on express statutory enactments, *Isbell v. Graybill*, 19 Col. App., 508; in others on implications in the statutes, requiring the transfers to be recorded on the books of the corporation, *Central National Bank v. Williston*, 138 Mass., 244; while a third class base their doctrine on